HALIM SHAHRIMAN & ASSOCIATES v. VC TECHNOLOGIES SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
SU GEOK YIAM J
[CIVIL SUIT NO: S-21-197-2010]
28 APRIL 2015

ARBITRATION: *Award – Enforcement – Plaintiff appointed as consultant architect by Yayasan Kontraktor-Kontraktor Melayu Pahang Corporation Bhd ('YKMP') – YKMP entered into sub-contract-cum-assignment with first defendant – Termination of plaintiff's services – Dispute referred to arbitration – Award made in favour of plaintiff – Award registered in High Court against Konsortium Kontraktor-Kontraktor Melayu Pahang ('KKMP') (previously known as YKMP) – Failure of KKMP to honour award – Whether first defendant could be held liable to satisfy award – Whether unjust and abuse of court's process to enforce award against first defendant*

CIVIL PROCEDURE: *Striking out – Action – Action to enforce arbitration award – Whether unjust and abuse of court's process to enforce such award – Whether action ought to be struck out*

CONTRACT: *Assignment – Assignment of debts – Absolute assignment – Whether existed*

CONTRACT: *Privity of contract – Assignment – Plaintiff appointed as consultant architect – First defendant appointed as sub-contractor-cum-assignee for project – Termination of plaintiff's services – Whether plaintiff had locus to enforce contract as consultant architect against first defendant*

Vide a letter of intent, the Secretary General of the then Ministry of Higher Studies ('the third defendant'), acting on behalf of the Federal Government of Malaysia, the fourth defendant ('the Government'), offered to Yayasan Kontraktor-Kontraktor Melayu Pahang Corporation Bhd ('YKMP') the right to design, construct and complete a polytechnic ('the project') to be called Politeknik Muadzam Shah ('the polytechnic'). The project was a turnkey project. By a letter of appointment, and before the project was formally awarded to YKMP by the Government, YKMP appointed the plaintiff as the consultant architect for the project. Pursuant to the terms of the letter of appointment, the plaintiff prepared the construction drawings and designs for the project up to the construction stage. Subsequently, by a written agreement dated 6 July 2000 ('the sub-contract-cum-assignment'), entered into between YKMP and VC Technologies Sdn Bhd ('first defendant'), YKMP appointed the first defendant as the sub-contractor-cum-assignee for the project. YKMP then terminated the services of the plaintiff and appointed a new consultant architect for the project. When YKMP failed to complete the project on time, the third defendant terminated YKMP's appointment as first main contractor

for the project. Upon the said termination, the third defendant, upon recommendations of YKMP, appointed Kausar Corporation Sdn Bhd ('second defendant') to replace YKMP as the second main contractor for the project. At the material time, the first and second defendants had the same directors and shareholders. However, due to the second defendant's delay in completing the project, the third defendant also terminated the services of the second defendant as the second main contractor. The plaintiff proceeded to dispute the legality of the termination by YKMP and contended that its termination was unlawful by virtue of YKMP's failure to pay the plaintiff's professional fees and charges. The plaintiff, therefore, referred the dispute for arbitration. The plaintiff notified the third defendant and the Government of the arbitral proceedings commenced by the plaintiff against YKMP and also the status of the arbitral proceedings. However, the plaintiff neither commenced arbitral proceedings against the first and second defendants nor notified the first and second defendants of the arbitral proceedings that it had commenced against YKMP. Upon the conclusion of the arbitral proceedings, the final award was handed down in favour of the plaintiff ('the final award'). YKMP was later changed to Konsortium Kontraktor-Kontraktor Melayu Pahang ('KKMP'). The plaintiff registered the final award against KKMP at the High Court. In addition to the final award, the court also ordered KKMP to pay to the plaintiff reimbursement for the costs of the final award and the costs of the arbitral proceedings which were to be assessed ('the judgment sum'). Due to KKMP's failure to pay the plaintiff the judgment sum, the plaintiff initiated winding-up proceedings against KKMP and KKMP was ordered to be wound-up. On 30 July 2010, the plaintiff filed the present suit against all the four defendants and sought, *inter alia*, for a declaration that the four defendants were jointly and severally liable to pay to the plaintiff the final award and the judgment sum. However, the plaintiff withdrew its suit against the second and third defendants and also the Government. The trial proceeded only between the plaintiff and the first defendant. Upon conclusion of the trial, the first defendant submitted that it could not be held liable for the final award since (i) the contract of appointment of the plaintiff as the original consultant architect for the project bound only KKMP and the plaintiff, thus it could only be enforced by the plaintiff against KKMP and not against the first defendant; and (ii) by virtue of the wording of the assignment clause, the assignment was neither an absolute assignment nor a debt assignment. Therefore, the first defendant argued that the plaintiff's claim ought to be dismissed. The issue that arose for determination, *inter alia*, was whether the first defendant was liable to pay the plaintiff the final award by virtue of the assignment clause in the sub-contract-cum-assignment dated 6 July 2000 that was entered into between the first defendant and KKMP.

Held (dismissing plaintiff's claim with costs):

(1) A contract cannot confer rights or impose obligations arising under the contract on any person except the parties to the contract itself. In the instant case, there was no contractual nexus between the plaintiff and the first defendant since there was no agreement executed between them. The appointment of the plaintiff as the consultant architect for the project was made by YKMP even before YKMP signed the main contract with the Government and before YKMP signed the sub-contract-cum-assignment with the first defendant on 6 July 2000. Therefore, the first defendant is not liable to pay the plaintiff the final award by virtue of the assignment clause in the sub-contract-cum-assignment dated 6 July 2000 that was entered into between the first defendant and KKMP. (paras 106-108)

(2) Since the plaintiff has no privity of contract with the first defendant, the first defendant cannot be held liable for the debt that KKMP owed to the plaintiff. Any undertaking or agreement between the first defendant and KKMP cannot be enforced by the plaintiff against the first defendant. (paras 109-110)

(3) There was no privity of contract between the plaintiff and the first defendant since the plaintiff was not a party to the sub-contract-cum-assignment that was executed by the first defendant and KKMP. There is nothing therein that mentioned the appointment of the plaintiff by KKMP as the consultant architect for the project. The first defendant is also not a party to the contract between the plaintiff and KKMP. Therefore, the plaintiff has no *locus* to enforce the main contract between the first defendant and the Government or to enforce the contract between the plaintiff and KKMP for the appointment of the plaintiff as the consultant architect for the project against the first defendant. (paras 111-113)

(4) The assignment in the instant case was not an absolute assignment. Not all the interests of YKMP under the main contract were transferred to the first defendant as the Government was not aware of the assignment and did not consent in writing to the assignment. There was no absolute or equitable assignment of YKMP's rights under the main contract to the first defendant and that the assignment was only for YKMP's obligations to the Government in relation to the development and completion of the project. (paras 127 & 130)

(5) KKMP terminated the plaintiff's services after the execution of the agreement and had also appointed a new architect to replace the plaintiff as the consultant architect for the project. It is clear that KKMP did not assign its rights and liabilities *vis-à-vis* the plaintiff to the first defendant. Therefore, the assignment could not be construed as an assignment of

debt. Since the assignment is neither an absolute assignment nor a debt assignment, the first defendant was not liable to pay to the plaintiffs the judgment sum. (paras 135-138)

(6) Separate legal entities have separate rights and liabilities. The first and second defendants were not the same entity merely because they shared common directors and shareholders. Further, the first defendant, *inter alia,* was not a party and did not participate in the arbitral proceedings. To allow the plaintiff to enforce the final award against the first defendant would be unjust as it amounts to an abuse of the process of the court. Thus, the first defendant cannot be declared to be liable to pay the plaintiff the amount of the final award. (paras 139, 140, 141, 142 & 148)

(7) Since the plaintiff elected to challenge the validity of its termination against KKMP alone instead of against KKMP and the first defendant by making them both jointly and severally liable to the plaintiff on the ground that the first defendant was the *de facto* contractor to the project, it was too late now for the plaintiff to attempt to pin liability on the first defendant after it had failed to obtain satisfaction of the final award and the reimbursement of the costs of the arbitral proceeding from KKMP. (para 144)

Case(s) referred to:

Artic Building and Civil Engineering Sdn Bhd v. Ahmad Zaki Sdn Bhd & Ors [2009] 1 LNS 403 HC ***(foll)***

Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd [1985] 1 CLJ 56; [1985] CLJ (Rep) 231 FC ***(refd)***

Public Finance Bhd v. Scotch Leasing Sdn Bhd; Perwira Habib Bank Malaysia (Intervener) [1996] 3 CLJ 635 FC ***(refd)***

Suwiri Sdn Bhd v. Government of The State of Sabah [2008] 1 CLJ 123 FC ***(refd)***

Tenaga Nasional Bhd v. Irham Niaga Sdn Bhd & Anor [2011] 1 CLJ 491 CA ***(foll)***

The Chartered Bank v. Rashid Mohamed [1985] 1 LNS 133 HC ***(refd)***

The Golf Cheque Book Sdn Bhd & Anor v. Nilai Springs Bhd [2006] 1 CLJ 259 CA ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 4(3)
Contracts Act 1950, s. 71

Other source(s) referred to:

Black's Law Dictionary, 9th edn, pp 136, 137
Chitty on Contracts, vol 2, 31st edn, pp 1691-1694
Osborn's Concise Law Dictionary, 11th edn, p 40

For the plaintiff - Umarani Manikarasegara; M/s Idris & Partners
For the defendants - Azwan Abdul Wahab; M/s Dzahara & Assocs

Reported by Sandra Gabriel

JUDGMENT

Su Geok Yiam J:

Plaintiff's suit

[1] In this suit, the plaintiff is claiming for a declaration against the first and second defendants that the first and second defendants are jointly and severally liable to pay to the plaintiff the sum of RM3,285,903.30 being the sum total of firstly, the amount of RM3,200,575.40 being the final award of the arbitrator dated 28 February 2005; secondly, the amount of RM42,572.65 being the reimbursable items; and thirdly, the amount of RM41,755.25 being the reimbursement of the costs for the award and also the costs of the arbitral proceedings to be assessed by the court together with interest thereon and costs; and for a declaration against the third and fourth defendants that the plaintiff is the owner of the intellectual property in the drawings and designs that have been prepared and completed by the plaintiff for a project.

Background Facts

[2] Halim Shahriman & Associates, the plaintiff, is a firm of architects registered with the Board of Architects, Malaysia.

[3] VC Technologies Sdn Bhd, the first defendant, and Kausar Corporation Sdn Bhd, the second defendant are private companies incorporated under the Companies Act 1965.

[4] At the material time, the first and second defendants had the same directors and shareholders.

[5] The Secretary General of the then Ministry of Higher Studies, the third defendant, is a public officer and the representative and agent of the Federal Government of Malaysia, the fourth defendant ("the Government").

[6] By a letter of intent dated 18 September 1999 ("the letter of intent"), the third defendant, acting on behalf of the Government, offered to Yayasan Kontraktor-Kontraktor Melayu Pahang Corporation Bhd (Co Reg No 348579 K) ("YKMP") the right to design, construct and complete a polytechnic measuring a total area of 140 acres ("the project") situated in the District of Bandar Muadzam Shah, Mukim Bebar, Daerah Pekan, Negeri Pahang and to be called "Politeknik Muadzam Shah", ("the polytechnic") for the use of the then Ministry of Higher Studies.

[7] The project is a turnkey type of project.

[8] Subsequently, by a letter dated 7 March 2000 ("the letter of appointment"), and before the project was formally awarded to YKMP, YKMP appointed the plaintiff as the consultant architect for the project.

[9] Pursuant to the terms of the letter of appointment, the plaintiff prepared the construction drawings and designs for the project up to the construction stage.

[10] The third defendant and the Government are the end users of the plaintiff's drawings and designs for the project.

[11] The letter of appointment states as follows:

YKMP
Yayasan Kontraktor Melayu Pahang
YKMP
Corporation
Berhad
(Co. Reg. No. 348579 K)

Our Ref: Bil (002) dlm. YKMP/HAS-POLY/00
Date: 07 March 2000

Halim Shahriman & Associates
10-1, Jalan 6/62A
Bandar Manjalara
52200 Kuala Lumpur

Dear Sir,

Polytechnic Bandar Muadzam Shah, Pahang Darul Makmur

– Appointment of Architect

We refer to the above

We are pleased to inform you that the management has agreed to appoint your company Halim Shahriman & Associates as the Architect for the above project subject to you agreeing to the following terms and conditions.

1. Architectural Services

a) To acquire the approved project brief from the Ministry of Education

b) To prepare the concept of development and the layout plan based on the requirement in the project brief and approved by the client

c) To produce the appropriate working drawing for the purpose of price negotiation with the Government and subsequently for local authorities approval

d) To produce drawings and documents for contract document

e) To produce construction drawings and the required details

f) To forward and acquire the approval of all submission required by the respective authorities inclusive of securing the Development Order

g) Securing of the Certificate of Fitness for occupation of the building

2. Supplementary Design Services

a) To lead the other consultants in coordinating technical planning and implementation on behalf of client.

b) To maintain a close liaison and rapport with the Project Management Consultants (PMC) throughout.

3. Apart from those mentioned in para 1 and 2, your scope of services shall also be based on the full basis services of the Architect Rules 1986 Scale of Minimum Fees.

4. Professional Fees

4.1 The architectural fees shall be under category 1 to the PAM Scale of Minimum Fees. Your professional fees shall be 25% of construction cost. The payment basis is as follows:

4.1.1 Schematic Design Phase	10%
4.1.2 Design Development Phase	20%
4.1.3 Contract Documentation Phase	10%
4.1.4 Contract Implementation (Progressive – based on percentage of construction work)	50%
4.1.5 Practical Completion	5%
4.1.6 Final Certificate	5%
	100%

4.2 Reimbursable. All reimbursable shall have prior authorization from the Project Manager and all claims for such shall be accompanies with the Authorisation Certificate.

4.3 Appointment of Other Consultants. All appointments shall first receive the written agreement from the Project Manager.

5. Supplementary Design Services

5.1 Fees for other supplementary design services (Landscape, interior etc) shall be negotiated as and when such requirement arises.

6. Progress Of Work

6.1 The Architect shall at all time to adhere to the approved programme of design work and keep all information, drawings etc up to date. The Architect shall exercise all reasonable skill, care and diligence in discharging the professional services. YKMP reserve the rights to take necessary action to intervene should the approved programme design works are not adhered to.

7. Arbitration

If at any time any question, dispute or difference of opinion shall arise in relation to this engagement, it shall be referred to the arbitration and the award of the Arbitrator shall be final and binding upon the parties. The arbitration shall be held at the Regional Center for Arbitration at Kuala Lumpur.

8. Delivery Of Documents Upon Termination

Upon termination either by the Client or the Architect, the Architect shall deliver to the Client such completed drawings in the form of hard and soft copy, specifications and other similar documents relevant to the Works together with the Letter of Release

This appointment shall be continued and shall be subjected to the execution of the Privatisation Agreement between Yayasan Kemajuan Melayu Pahang (YKMP) and the Government of Malaysia (Ministry of Education).

We shall be glad if you could formalize the acceptance of this appointment by signing the appended certificate and returning the duplicate of this letter to us. We look forward to hearing from you.

Thank you.

Yours faithfully,
YKMP Corporation Berhad

... (Signature) ...
Lt. Col (R) Johar Abdullah
Project Manager

[12] Subsequently, without the knowledge of the plaintiff and by a written agreement dated 6 July 2000 ("the sub-contract-cum-assignment"), entered into between YKMP and the first defendant, YKMP appointed the first defendant as the sub-contractor-cum-assignee for the project.

[13] At the time the sub-contract-cum-assignment was entered into between YKMP on one part and the first defendant on the other part, the Government was in the process of issuing the letter of acceptance of tender to YKMP in respect of YKMP's tender to be appointed as the main contractor by the Government for the project for the contract sum of RM219,000,000.

[14] Pursuant to recital 4 of the sub-contract-cum-assignment, YKMP and the first defendant agreed to undertake the project upon the terms, conditions, covenants and stipulations contained therein.

[15] Pursuant to s. 4.1(i) of the sub-contract-cum-assignment, the first defendant covenanted with YKMP that the first defendant shall do the following acts:

(a) … complete the said project at its own risk, expenses, bearing and absorbing the whole of the contract sum and to deliver the Project in accordance with the **Contract Agreement** and in strict compliance with all applicable laws, rules and regulations of all the authorities having jurisdiction over the project in accordance with the provisions of this Agreement within the Completion Date;

(b) … provide all the development costs of the Project and shall undertake all liabilities and absolver *(sic)* YKMP from the same that may arisen *(sic)* from any parties *(sic)* in the implementation and *(sic)* the completion of the Project;

(c) … provide the necessary financing required for the completion of the project in accordance with the terms and conditions of this Agreement and the **Contract Agreement**;

(d) … at its own costs and expense carry out the construction and development works in workmanlike manner and (*sic*) accordance with the **Contract Agreement**;

(e) … at its own costs to provide manpower working at supervisory level at site and where working apparels and uniform (*sic*) are provided by VC Technologies apparels and uniforms shall carry the identification of YKMP;

(f) … provide all the materials and perform all the work mentioned in the **Contract Agreement** and shall provide all scaffolding, plant, tools and appliances necessary for the execution of the construction works and the performance of this contract and for those purposes shall employ duly qualified and experience (*sic*) artisans, workmen and other to carry out the development works;

(g) … execute project in accordance or within the contract sum or any other sum agreed by YKMP and the Government in the **Contract Agreement**;

(h) … observe and comply with the requirement of all the statutes, rules (*sic*) orders (*sic*) ordinance and by laws and requirements of all the relevant authorities in respect of the Project and shall secure necessary permit and sanctions of the proper authorities in respect of the Project and shall generally comply with the building and other ordinances, regulations or by-laws of such authorities and shall pay all fees and bear all cost connected therewith and shall keep YKMP indemnified against all fines, penalties and loss (*sic*) incurred by any breach of this stipulations *(sic)*;

(i) Upon the completion of the development works, shall clear away and remove from the site all construction plants, surplus materials, debris, rubbish and temporary works of every kind and leave the whole of the Site clean and in a workman like condition.

(emphasis added).

[16] Pursuant to s. 1 of the sub-contract-cum-assignment, the "Contract Agreement" is defined as follows:

> Means the Contract Agreement for the Project between the Government of Malaysia and YKMP and shall be taken, read and construed as an essential and integral part of this Agreement.

[17] Pursuant to s. 2.1 of the sub-contract-cum-assignment, YKMP agreed to assign all its benefits, rights, interests and obligations in the project to the first defendant.

[18] The section expressly provides as follows:

> In consideration of a sum of RM 2,800,000.00 to be paid by the 1st defendant to YKMP, YKMP agrees to grant and transfer to the 1st defendant, all the benefits, rights and interests in the main contract including the obligations contained therein.

("the assignment clause").

[19] Pursuant to s. 4.2(ii)(c) of the sub-contract-cum-assignment, YKMP covenanted and undertook to secure the letter of acceptance of tender from the Government and to fully comply with the terms and conditions contained therein.

[20] Pursuant to s. 4.2(ii)(d) of the sub-contract-cum-assignment, YKMP covenanted and undertook to execute the contract agreement with the Government.

[21] Pursuant to s. 5.1 of the sub-contract-cum-assignment, YKMP and the first defendant undertook with each other to:

(a) …

(b) …

(c) If and when and to the extent requested so to do, sign, execute and perform such further acts, deed, documents, instruments, applications, plan and things as may be required for the purpose of giving full effect to the provisions hereof and carrying out this objective of this Agreement;

(d) To open a join *(sic)* in-escrow account with any financial institution nominated by VC Technologies and YKMP shall give irrevocable instructions to the Government that all payments, part payments or progressive payments relating to the Project shall be made to the escrow account;

(e) To ensure that all payments, part payments or progressive payment made by the Government relating to the project shall be deposited/ credited into the join *(sic)* in-escrow account held by the parties;

(f) To appoint **Ventures Master (M) Sdn. Bhd. (169190-A)** or any other entity or a company or person as the project manager on behalf of the YKMP to deal directly with the Government on matters relating to securing the letter of award not limiting to

managing the development of the Project upon receiving the Surat Setuju terima or receiving affirm *(sic)* directive from the Government to commence the project.

[22] Pursuant to s. 5.2 of the sub-contract-cum-assignment, the parties agreed that the project shall be managed by the first defendant who shall be responsible for the day to day management of the project and the first defendant shall be authorised to enter into whatsoever arrangement, agreements and understanding with any party so long as it is related to and is in connection with the project and Contract Agreement and the first defendant shall also inform YKMP and notify YKMP in writing such appointments, arrangements, agreements and understanding.

[23] Section 8 of the sub-contract-cum-assignment deals with the duration and termination of the sub-contract-cum-assignment.

[24] Pursuant to the express wording of s. 8(1) of the sub-contract-cum-assignment, the sub-contract-cum-assignment shall continue to be in full force and effect unless and until it is deemed to be terminated upon the mutual agreement between the parties, as provided in s. 8.1(a), or upon the occurrence of the events of default by the parties as stated in s. 8.1.2 as provided in of s. 8.1(b).

[25] Section 8.1.2 deals with the seven events of default.

[26] Section 8.2 deals with the consequences of termination of the sub-contract-cum-assignment.

[27] Section 8.2.1 (a) deals with the termination by YKMP.

[28] Pursuant to s. 8.2.1(a)(ii)(bb) of the sub-contract-cum-assignment, YKMP and the first defendant also agreed that if YKMP terminates the assignment pursuant to s. 8(1)(b) of the sub-contract-cum-assignment, the first defendant shall be responsible and shall indemnify YKMP for any action taken by any party arising from the default.

[29] Section 8.1.2(b) which deals with termination by the first defendant expressly provides that if a party becomes insolvent or makes an assignment for the benefit of its creditors or enters into any general arrangement or composition with or for the benefit of its creditors, the agreement is deemed to be terminated.

[30] Subsequently, by the mutual agreement of YKMP and the plaintiff as provided in s. 8.1(a) of the sub-contract-cum-assignment and by a letter dated 19 May 2001 ("the letter") that was addressed to and sent to the plaintiff by Lt Kol (B) Johar bin Abdullah, the designated project manager, on behalf of YKMP, the services of the plaintiff as the consultant architect were terminated by YKMP.

[31] YKMP then offered to pay to the plaintiff a sum of RM1,001,300.08 as the plaintiff's professional fee ("the offer"). However, the plaintiff refused to accept the offer. The plaintiff's refusal to accept the offer was communicated to YKMP *vide* the plaintiff's three letters dated 25 May 2001, 7 June 2001 and 5 July 2001, respectively. In these three letters, the plaintiff insisted that YKMP pay to the plaintiff the sum of RM 6,238,599.47 being the total amount of a sum of RM5,423,473.13 being its full professional architect's fees, a sum of RM50,000 being the abortive fees, and a sum of RM765,126.34 being the plaintiff's loss of expected profit.

[32] YKMP then appointed a new consultant architect for the project.

[33] Later, when YKMP failed to complete the project on time ie, within 24 months from 15 September 2001 to 14 September 2003, the third defendant acting on behalf of the Government terminated YKMP's appointment as the main contractor for the project.

[34] Upon the termination of YKMP as the first main contractor for the project, the third defendant, acting on behalf of the Government and upon the recommendation of YKMP, appointed the second defendant to replace YKMP as the second main contractor for the project.

[35] Subsequently, due to the second defendant's delay in completing the project, the third defendant acting on behalf of the Government also terminated the services of the second defendant as the second main contractor.

[36] In its letter dated 5 July 2001, the plaintiff disputed the legality of the termination of its appointment by YKMP and contended that its termination was unlawful by virtue of the failure of YKMP to pay to the plaintiff the total sum of RM6,238,599.47 being the plaintiff's professional fees and charges. In the same letter, the plaintiff agreed to refer the dispute to arbitration pursuant to condition 7 in the letter of appointment.

The plaintiff then commenced arbitral proceedings against YKMP in accordance with condition 7 in the letter of appointment in order to claim for payment of the total sum of RM6,238,599.47.

[37] Condition 7 states as follows:

> **7. Arbitration**
>
> If at any time any question, dispute or difference of opinion shall arise in relation to this engagement, it shall be referred to the arbitration and the award of the Arbitrator shall be final and binding upon the parties. The arbitration shall be held at the Regional Center for Arbitration at Kuala Lumpur.

[38] YKMP denied that it had wrongfully terminated the plaintiff's services. It contended that the termination was because of the plaintiff's delay in the production of the drawings; non-compliance with the project brief in the drawings that the plaintiff had provided; and other inadequacies in the plaintiff's services.

[39] YKMP also counterclaimed against the plaintiff for a sum of RM25 million being the total losses it had allegedly suffered. This sum comprised a sum of RM11 million that was allegedly caused by the plaintiff's non-compliance with the SOA, a sum of RM9 million being the liquidated damages arising from delays allegedly caused by the plaintiff and a sum of RM5 million being the loss allegedly suffered by YKMP due to the letter of undertaking.

[40] The plaintiff notified the third defendant and the Government of the arbitral proceedings commenced by the plaintiff against YKMP and also the status of the arbitral proceedings.

[41] However, the plaintiff neither commenced arbitral proceedings against the first and second defendants nor notified the first and second defendants of the arbitral proceedings that it had commenced against YKMP.

[42] According to the plaintiff, this was because they were not aware of the existence of the sub-contract-cum-assignment that was entered into between YKMP and the first defendant.

The Arbitral Issue

[43] The issue that was referred to arbitration is as follows:

> Settlement of disputes over the amount of professional fees and losses/ damages payable to the Consulting Architect by the Turnkey contractor due to the early termination of the Consulting Architect's services by the Turnkey Contractor.

The Final Award

[44] On 28 February 2005, upon the conclusion of the arbitral proceedings, Ar Koh Beng TCK, the arbitrator, handed down his final award in favour of the plaintiff for a sum of RM3,243,148.05 (a sum of RM3,200,575.40 being the professional architect's fee for the services rendered by the plaintiff to YKMP for the project + a sum of RM42,572.65 being the total of the reimbursable ie, RM15,000 being the cost of computer animation, RM22,779.40 being the printing charges and RM4,793.25 being the travelling costs). In arriving at the final award, the arbitrator found that no abortive fee was applicable; that the plaintiff's claim for loss of expected profit is untenable; that the allegations concerning the plaintiff's non-compliance with SOA are unfounded and unproven; and that KKMP's counterclaim for liquidated and ascertained damages is wrong ("the final award").

[45] YKMP was later changed to Konsortium Kontraktor-Kontraktor Melayu Pahang ("KKMP").

[46] Subsequently, the plaintiff applied to register the final award against KKMP *vide* Kuala Lumpur High Court Originating Summons No.: R1-24-19-2005.

[47] On 26 August 2005, Md Raus bin Sharif J (now PMR) ordered that the final award be registered in favour of the plaintiff against KKMP. In addition to the final award, the learned judge also ordered KKMP to pay to the plaintiff a sum of RM41,755.25 being the reimbursement for the costs of the final award. The learned judge further ordered KKMP to pay to the plaintiff the costs of the arbitral proceedings which are to be assessed ("the judgment sum").

Execution Proceedings Against KKMP

[48] Due to the failure of KKMP to pay to the plaintiff the judgment sum, the plaintiff commenced execution proceedings against KKMP in the Kuala Lumpur High Court ("KLHC").

[49] Upon the failure of KKMP to settle the judgment sum, the plaintiff initiated winding-up proceedings against KKMP in the KLHC and KKMP was ordered by the KLHC to be wound-up for its failure to settle the judgment sum.

[50] On 30 July 2010, the plaintiff filed the instant suit against all the four defendants.

Plaintiff's Pleaded Case

[51] The plaintiff's pleaded case is as follows:

(1) It was only after KKMP was wound-up that the plaintiff discovered that the first and second defendants were actually the *de facto* turnkey contractor for the project;

(2) The first and second defendants had used KKMP as a front to undertake the works for the project;

(3) All the matters pertaining to the implementation of the project were carried out by the directors and officers of the second defendant in the name of KKMP;

(4) Even the appointment and termination of the plaintiff as the original consultant architect for the project was also made by the second defendant in the name of KKMP;

(5) Subsequently, the plaintiff found out that the second defendant and KKMP had entered into two written agreements dated 11 October 1999 and 6 July 2000, respectively ("the two agreements"); for the first

defendant to be the *de facto* main contractor for the project, and for KKMP to be only the front for the first defendant for the carrying out of the works for the project;

(6) *Vide* the two agreements, the first defendant has also given an undertaking to indemnify KKMP against any claim from any party that is related to the project;

(7) The second defendant was the *de facto* main contractor all along;

(8) The drawings and designs belong to the plaintiff because they were prepared by the plaintiff;

(9) The plaintiff's drawings and designs were used for the construction of the project by the new consultant architect, who was appointed by KKMP to replace the plaintiff, because the entire construction of the project was implemented based on the drawings and designs created and owned by the plaintiff and any amendment and change to the drawings were due only to variation orders that were issued during the construction stage;

(10) It is an agreed fact that at the time the plaintiff instituted the arbitral proceedings against KKMP, all the architectural works that were carried out by the plaintiff for the project had reached the contract documentation stage and the main contract for the project was evaluated and priced based on the plaintiff's drawings and designs;

(11) The plaintiff is entitled to be paid for all the works done by the plaintiff and not merely for a sum of RM1,001,300.08 as stated in YKMP's letter of termination;

(12) The two main contractors ie, firstly, YKMP, and later, the second defendant, and the two *de facto* contractors for the project ie, the first and second defendants, have used and received the benefit from the drawings and designs created by the plaintiff for the implementation of the project;

(13) The third defendant and the Government being the owners of the project have also benefitted from the use of the drawings and designs created by the plaintiff for the project;

(14) Pursuant to s. 71 of the Contracts Act 1950, the plaintiff is entitled to be adequately compensated by them for the full fees of the architectural works done by the plaintiff since the second, third and fourth defendants have benefitted from the plaintiff's intellectual property in the drawings and designs created by the plaintiff for the project;

(15) The new consultant architect, who was appointed to replace the plaintiff, is only entitled to receive the fees for the works done during the construction stage and not for the works done prior to the construction stage because these works had already been done by the plaintiff; and

(16) The first and second defendants are to be treated as a single entity and/or the second defendant is to be treated as the related entity or the associated company of the first defendant because both the first and second defendants have common directors and shareholders.

Plaintiff's Claim

[52] Hence, on 30 July 2010, the plaintiff filed this suit against the first to the fourth defendants, seeking for the following reliefs against the first to the fourth defendants as set out in sub-paras. (a) to (g) of para. 33 of the plaintiff's statement of claim dated 30 July 2010:

(a) a declaration that the drawings and designs used in the project are the plaintiff's intellectual property;

(b) a declaration that the four defendants are jointly and severally liable to pay to the plaintiff the sum of RM3,243,330.65, being the total of the amount of the final award of RM3,200,575.10, the amount of the reimbursable items of RM42,573.65 and the amount of RM41,775.25 being the costs of the arbitral award;

(c) an order that the first and second defendants shall pay to the plaintiff a sum of RM92,630.50 being the cost of the arbitral proceedings;

(d) alternatively, for an order that the fees for the usage of the plaintiff's works in the project shall be assessed by this Honourable Court;

(e) interest at 8% per annum on the judgment sum from the date of the filing of this suit until the date of realisation;

(f) the costs for this action; and

(g) such other reliefs as this honourable court deems fit and proper.

First Defendant's Statement Of Defence

[53] In its statement of defence ("defence"), the first defendant pleaded as follows:

(1) It owes no contractual obligations to the plaintiff as the plaintiff was appointed and terminated by KKMP.

(2) Since the dispute between the plaintiff and KKMP has been decided in the arbitral proceedings, any undertaking or agreement between the first defendant and KKMP, as stipulated in the sub-contract-cum-assignment, cannot be enforced by the plaintiff against the first defendant in this suit based on the following reasons:

(a) the arbitration award is against KKMP and not against the first defendant;

(b) the plaintiff has taken out execution proceedings against KKMP at the KLHC by way of a winding-up proceeding; and

(c) KKMP has been wound-up.

(3) The plaintiff's suit against the first and second defendants is an abuse of the process of the court because the first and second defendants were not made parties to the arbitral proceedings and, hence, they did not have the opportunity to defend themselves against the plaintiff's claim in the arbitral proceedings.

Events Subsequent To The Filing Of The Plaintiff's Suit

[54] Subsequent to the filing of the plaintiff's suit, the second defendant was wound-up and the plaintiff withdrew its suit against the second defendant.

[55] The court then struck out the plaintiff's suit against the second defendant.

[56] The plaintiff's suit against the third defendant and the Government was also struck out by the court upon the plaintiff's application to the court to that effect.

[57] Hence, the plaintiff has abandoned its prayer for a declaration against the third defendant and the Government that the drawings and designs prepared by the plaintiff and used in the project are the intellectual property of the plaintiff.

[58] The plaintiff is only continuing with its prayer for a declaration against the first defendant that the first defendant is liable to pay to the plaintiff the total sum of RM3,284,903.90 and also the costs of the arbitral proceedings to be assessed by the court together with interest thereon and costs.

[59] Hence, the trial of the plaintiff's suit proceeded only between the plaintiff and the first defendant.

The Trial

[60] In the trial, the parties called three witnesses, altogether.

[61] The plaintiff called two witnesses. They are Mr Halim bin Esa, the principal partner of the plaintiff, as PW1 and Mr Idris bin Md Isa, the former solicitor for the plaintiff, as PW2.

[62] PW1 is a qualified architect. He was involved in the preparation of the drawings and designs for the project.

[63] The defendant called one witness. He is Mr Tarin bin Ayob, a common director of the first and second defendants, as DW1.

PW1's Evidence

[64] In his examination-in-chief given in the form of a witness statement (P1), PW1 stated as follows:

(1) At the material time, En Abdul Haiyee bin Hashim, PW1's partner, was the architect-in-charge of the project. However, PW1 was also directly involved in the project and at other times, En Haiyee would also brief him of the progress of the project, besides having regular discussions with him from time to time;

(2) Although the plaintiff was appointed by KKMP previously known as YKMP, the actual parties behind the appointment of the plaintiff are the first and second defendants who were the *de facto* main contractors for the project because the first and second defendants have the same shareholders and directors.

(3) In addition, from the very beginning of the plaintiff's work on the project, the plaintiff was dealing with and receiving instructions from the officers of the first and second defendants. This is because the first person whom En Haiyee met was Lt Col (B) Johar bin Abdullah and they knew that he was the first and second defendants' project manager. Furthermore, the letter of appointment of the plaintiff and the letter of the termination of the plaintiff's services were also signed by him.

(4) Apart from the above, at all material times, all the technical meetings if they were not held at the office of the project manager (KIP Management Sdn Bhd), were held in the office of the second defendant. In almost all the technical meetings, KKMP/YKMP was represented by the officers of the first and second defendants. Besides that, the correspondences from the plaintiff although written to YKMP, were addressed to the first defendant or the second defendant.

(5) The plaintiff's covering letter dated 23 September 2000 for the submissions of its architectural drawing was directed to the "group Managing Director, Kausar Corporation Sdn Bhd" and addressed to the second defendant.

(6) In furtherance to the above, all the correspondences from KKMP/YKMP to the plaintiff were signed by Lt Col (R) Johar bin Abdullah ("Lt Col (R) Johar"), who is the project manager for the first defendant or the second defendant.

(7) The plaintiff has referred to the following fifteen documents in support of its claim against the first defendant:

(a) Plaintiff's letter of appointment by YKMP (pp. 19-22 CB);

(b) Plaintiff's letter of termination by YKMP (p. 23 CB);

(c) Plaintiff's letter to YKMP on the plaintiffs termination (p. 24 CB);

(d) Plaintiff's letter to YKMP dated 5 July 2001 (pp. 26-27 CB);

(e) Plaintiff's letter to YKMP dated 7 June 2001 (pp. 26-27 CB);

(f) Plaintiff's letter to YKMP dated 15 June 2001 (pp. 28-29 CB);

(g) Payment voucher by second defendant to plaintiff (p. 30 CB);

(h) Submission of construction drawing by the plaintiff to YKMP (p. 31 CB);

(i) Submission of construction drawing by the plaintiff to YKMP (p. 32 CB);

(j) Submission of construction drawing by the plaintiff to YKMP (p. 33 CB);

(k) Submission of building plan by the plaintiff to YKMP (p. 34 CB);

(l) Submission of construction drawing by the plaintiff to YKMP (p. 35 CB);

(m) Submission of architectural drawing by the plaintiff to the managing director of the second defendant (p. 36 CB);

(n) Technical meeting minutes (pp. 37-41 CB); and

(o) Letter from the second defendant's consultant engineer to YKMP (pp. 42-43 CB).

(8) Based on the 15 documents mentioned above, it is evident that all the documents were sent to the address of the second defendant and were not sent to the address of YKMP/KKMP which was in Kuantan. Referring to item (n) above, even the technical meetings were held in the office of the second defendant and not in YKMP's office. The documents above also clearly prove the involvement of the first defendant or the second defendant in the project and that they are the main contractor and *de facto* employer of the plaintiff. Hence, they are responsible to settle the liabilities of KKMP/YKMP as per the judgment dated 26 August 2005.

(9) At all material times, the plaintiff did not dispute the involvement of the first and second defendants in the project because from the very beginning there was a representation made by the first and second defendants to the plaintiff that they have received an absolute mandate from YKMP/KKMP for the project.

(10) The plaintiff did not seek any legal advice with regard to its dispute with YKMP until after the dispute between the parties was referred to arbitration and the appointment of Messrs Idris & Co as the plaintiff's solicitors was purely to represent the plaintiff in the arbitral proceedings.

(11) The plaintiff only discovered that the first and second defendants are the *de facto* main contractor for the project upon a search conducted by its solicitors on a suit ie, Civil Suit No. 22-21-2007 that was commenced by YKMP/KKMP at the Kuantan High Court against the first and second defendants which contained facts which were not within the knowledge of the plaintiff. It was based on that information that the plaintiff decided to initiate this action against the defendants.

[65] In cross-examination, PW1 testified as follows:

Question: In relation to Question 2 of your Witness Statement (P1), you stated that En. Abdul Haiyee was in charge of the project. So do you agree that only En. Abdul Haiyee would know what actually happened?

Answer: En. Abdul Haiyee was not the architect in charge from A to Z.

Question: Who appointed the plaintiff?

Answer: YKMP/KKMP officially appointed the plaintiff. Colonel Johar signed the Agreement i.e. the appointment letter, P19/BB.

Question: Who terminated the plaintiff's appointment?

Answer: The plaintiff's appointment was later terminated by YKMP.

Question: Who is to make payment to the plaintiff for the termination of the plaintiff?

Answer: YKMP is to make payment based on this letter.

The termination was in accordance with this letter of appointment.

Question: Do you agree that only YKMP can terminate the plaintiff's appointment and not the first defendant?

Answer: Yes, only YKMP can terminate the plaintiff's appointment and not the first defendant.

Question: Do you agree that under this letter of appointment, any claim by the plaintiff should be made to YKMP?

Answer: Yes, under this letter of appointment, any claim by the plaintiff should be made to YKMP.

Question: Do you agree that nothing in this letter of appointment mentioned the involvement of the first defendant?

Answer: Yes, nothing in this letter of appointment mentioned the involvement of the first defendant.

Question: Do you agree or disagree that any two companies with the same shareholders and same directors are the same entity?

Answer: Disagree that any two companies with the same shareholders and same directors are the same entity.

Question: But, in your answer to Question 4 in your witness statement (P1) you said the reverse.

Which is your answer?

Answer: No ie, not the same entity.

[66] PW1 agreed with the suggestion of the first defendant's learned counsel that the first and second defendants cannot terminate the plaintiff's services.

[67] It was YKMP who had terminated the plaintiff's services. After the termination, it was YKMP who had asked the plaintiff to submit its claim. The plaintiff submitted its claim to YKMP and upon obtaining the agreement of the plaintiff, the plaintiff's claim was referred to arbitration by YKMP. After 4 (four) years, the plaintiff obtained the award from the arbitrator.

[68] PW1 was involved in the arbitral proceedings as a witness.

[69] The plaintiff claimed for payment for the full amount of their professional fees from YKMP but the arbitrator only awarded a certain sum as their professional fees.

[70] On the day the plaintiff was appointed the consultant architect for the project, the plaintiff already knew the involvement of the first and second defendants in the project as the contractor. However, PW1 cannot recall whether it was YKMP who had told the plaintiff that the first and second defendants were the contractor.

[71] PW1 agreed with the suggestion of the first defendant's learned counsel that YKMP had informed the plaintiff that the first and second defendants were the project manager.

[72] Since YKMP did not pay to the plaintiff the amount of the arbitrator's final award, the plaintiff got YKMP wound up.

[73] The plaintiff's solicitors in the arbitral proceedings are the same as the plaintiff's solicitors in this suit.

[74] PW1 now knows that YKMP has withdrawn its suit ie, the Kuantan High Court suit, against the first and second defendants.

[75] PW1 does not know whether the first and second defendants have indemnified YKMP.

[76] PW1 also does not know whether the first and second defendants have been found liable to indemnify YKMP.

[77] The plaintiff is suing the first and second defendants based on the indemnity.

[78] PW1 has no idea whether YKMP has claimed against the first defendant and/or the second defendant for an indemnity in respect of the arbitral award and the payment of the sum claimed by the plaintiff.

[79] At the time of the arbitral proceedings, the plaintiff did not know about the agreement between YKMP and the first and second defendants. YKMP should have informed the plaintiff regarding any contract entered into between YKMP and a third party (see para. 22(a)-(g) of the plaintiff's statement of claim).

[80] Although the plaintiff's drawings and designs were addressed to and sent to YKMP, the plaintiff did not claim from YKMP for the plaintiff's intellectual property in the drawings and designs.

[81] In re-examination, PW1 reiterated as follows:

(1) PW1 is the principal partner in the plaintiff; all the decisions concerning the firm are made by PW1; and Encik Abdul Haiyee, who is the project architect, has to refer all matters concerning the project to PW1.

(2) When the plaintiff was appointed by YKMP, the plaintiff was informed that YKMP was the contractor for the project.

(3) It was only during the arbitral proceedings that PW1 found out that the role of YKMP was very minimal.

(4) PW1 explained as follows:

(a) Even Lt Col (R) Johar who signed the letter of appointment of the plaintiff and the letter or termination of the plaintiff's services is not the officer of YKMP because he is the director of the first and second defendants.

(b) In the letter of termination of the plaintiff's services, the name of Tahrin (who is the owner of the first and second defendants) is mentioned as the representative of YKMP (see p. 23/BB).

(c) There was, therefore, a misrepresentation on the part of YKMP to the plaintiff ie, that Lt Col (R) Johar represented YKMP at the material time.

(d) Subsequently, after the conclusion of the arbitral proceedings, the plaintiff discovered that this is not so when the plaintiff served on YKMP the final award and YKMP had expressed its shock.

(e) YKMP informed the plaintiff that it has no prior notice whatsoever of the arbitral proceedings instituted by the plaintiff against YKMP.

(f) The plaintiff has to resort to suing the first and second defendants because there is a secret agreement ie, the sub-contract-cum-assignment between YKMP and the first defendant, in which the

first defendant has agreed to indemnify YKMP in respect of any claim from any third party arising from the first defendant's default in the implementation and completion of the project under the sub-contract-cum-assignment.

[82] PW1 testified that when they received some payments from the second defendant ie, Kausar Corporation Sdn Bhd, they were very happy. He referred the court to the payment voucher that was issued by the second defendant in favour of the plaintiff for a sum RM50,000 (see p. 30/BB).

[83] He also referred to the letter from the plaintiff which enclosed the plaintiff's drawings and designs and which named YKMP as the recipient of the letter but the address of YKMP stated therein was actually the address of the first defendant (see p. 32/BB).

[84] He was of the view that the first and second defendants are the same entity or related entity because the address of the first defendant in the sub-contract-cum-assignment ie, Seksyen 1, Wangsa Maju, 53300 Kuala Lumpur (see p. 100/BB) is the same as the address of YKMP that is stated in the payment voucher issued by the second defendant ie, Section 1, Wangsa Maju (see p. 30/BB) even though the two addresses are clearly different, *albeit*, both are in Section 1, Wangsa Maju.

[85] He further testified that YKMP is a shell company.

PW2's Evidence

[86] In his examination-in-chief which is contained in his witness statement (P2), PW2 stated as follows:

(1) He is the solicitor who represented the plaintiff in the arbitral proceedings against YKMP/KKMP and he was also instrumental in having the arbitration award recorded as a judgment by the KLHC.

(2) He was the principal of Messrs Idris & Partners, the plaintiff's solicitors, and he has since ceased practice and is currently unemployed.

(3) He came to know about the fact that the first and second defendants are the *de facto* contractor for the project during the cross-examination of YKMP's witness, namely, Tarin bin Ayub, in the arbitral proceedings.

(4) He had questioned Tarin bin Ayub on his *locus standi* to testify for YKMP, and Tarin bin Ayub answered that YKMP has given a full mandate to the first and second defendants to represent YKMP. Tarin bin Ayub also testified that he was appointed as one of the directors of YKMP. However, PW2 later found out that the testimony of Tarin bin Ayub that he was appointed as a director of YKMP was untrue based on a company search that was done on YKMP.

(5) Later, YKMP acting through Messrs Sahadin & Co, its solicitors, opposed the plaintiff's application to record the arbitration award against YKMP at the KLHC; and

(6) Mr Sahadin, YKMP's solicitor, informed PW2 that there was an agreement that was entered into between YKMP and the first defendant or the second defendant with regard to the project but he did not give any further or detailed particulars of the agreement to PW2.

(7) Subsequently, the plaintiff instituted execution proceedings against YKMP to recover the judgment sum.

(8) The then General Manager of YKMP gave to PW2 a document ie, a duplicate copy of the sub-contract-cum-assignment (p. 76-103, BB), and he informed PW2 that at all material times YKMP /KKMP was not aware of the arbitral proceedings and that the first and second defendants had concealed from YKMP all information with regard to the arbitral proceedings against YKMP.

(9) Upon perusing the sub-contract-cum-assignment, Messrs Idris and Partners then conducted a company search on the first and second defendants and discovered that both the companies had the same shareholders and directors but he could not locate the search papers till to date.

(10) He then conducted a fresh search and the information obtained by him is similar to the results of the earlier search that he had conducted (pp. 1-18, BB).

(11) He was supposed to initiate the action against the first and second defendants in 2006 itself, but due to his severe health issues at the material time, he was not able to commence the action against the first and second defendants up until the time when limitation was about to set in.

(12) This was the main cause why a few crucial documents were misplaced.

(13) Subsequently, he conducted a file search at the Kuantan High Court and he obtained a copy of the undated writ of summons and the statement of claim dated 26 June 2006 for the Kuantan High Court Civil Suit No: 22-21-2007 ("the Kuantan High Court suit") that was filed by KKMP against two defendants who are the first and second defendants in the instant suit.

(14) The Kuantan High Court suit was filed by KKMP against the first and second defendants in the instant suit based firstly, on a joint venture agreement dated 11 October 1999 that was entered into between YKMP and the first defendant to develop and complete the project; secondly, on the sub-contract-cum-assignment dated 6 July 2000; and thirdly, on an undertaking dated 3 September 2003 that was given to YKMP by the

second defendant (whom YKMP had recommended to the Government to take over the completion of the project from the first defendant as a result of the delay on the first defendant's part in completing the project) that the second defendant shall take over and bear all the obligations and rights as contained in the sub-contract-cum-assignment dated 6 July 2000.

(15) It is clear from para. 39(1)(a) of KKMP's statement of claim in the Kuantan High Court suit that KKMP has claimed for a declaration that it is entitled to an indemnity from the first and second defendants in that suit (who are also the first and second defendants in the instant suit) for the judgment sum which includes the final award dated 28 February 2005 and for an order that the judgment sum be paid by the first and second defendants directly to Halim Shahriman & Associates (who is the plaintiff in the instant suit) and/or be handed over to KKMP for payment to Halim Shahriman & Associates.

(16) In the Kuantan High Court suit, KKMP alleged that it was not adequately paid its commission as provided in the sub-contract-cum-assignment and that it was also made to pay part of the arbitration costs for the final award.

(17) However, subsequently, the Kuantan High Court suit was struck out due to KKMP's failure to comply with case management directions.

(18) In the instant suit, the plaintiff is claiming that the first and second defendants are the same entity because both the first and second defendants have the same shareholders and directors.

(19) The plaintiff claims that the first defendant is liable to pay to the plaintiff the judgment sum even though the arbitration award and the judgment sum were recorded against YKMP/KKMP and not against the first defendant based on the following reasons:

(a) Pursuant to the agreement entered into between the first defendant and YKMP/KKMP, the first defendant has given an undertaking to indemnify YKMP/KKMP against any claim from any party that is related to the project;

(b) Furthermore, during the arbitral proceedings, all the witnesses who testified on behalf of YKMP/KKMP are the officers of the first and second defendants; and

(c) The thousands of documents produced during the arbitral proceedings clearly indicate that the first and second defendants are the *de facto* main contractor for the project and YKMP/KKMP was only used as a front by the defendants.

(d) In addition, since there are two company search reports which show that the first and second defendants have the same shareholders and directors and these two documents have been marked as exhibits during the arbitral proceedings, the first and second defendants cannot deny the existence of these two documents (pp. 1 to 18, BB).

(e) To support his evidence, he referred to the following documents:

(i) company search of the first defendant (pp. 1-6, BB);

(ii) company search of the second defendant (pp. 7-18, BB);

(iii) undated writ of summons and a statement of claim dated 26 June 2006 (pp. 44-61, BB);

(iv) arbitration award (pp. 62-73, BB);

(v) judgment in No. R1 – 24-19-2005 (pp. 74-75, BB);

(vi) plaintiff's letter to YKMP dated 5 July 2001 (p. 25, BB);

(vii) plaintiff's letter to YKMP dated 7 June 2001 (pp. 26-27, BB);

(viii) plaintiff's letter to YKMP dated 15 June 2001 (pp. 28-29, BB); and

(ix) agreement between YKMP and the first defendant (pp. 76-103, BB).

(f) PW1 also referred to the following documents that were referred to in the arbitral proceedings and/or obtained by him during the execution of the arbitration award that clearly show that the first defendant is the *de facto* contractor for the project:

(a) A letter from YKMP to the first defendant dated 21 August 2004 (pp. 1-2 plaintiff's supplementary bundle). In the letter, YKMP has clearly stated that the first defendant is responsible for any claim arising from any party with regard to the project.

(b) A fax transmission from the second defendant to YKMP/KKMP dated 4 April 2003 (pp. 3-13, plaintiff's supplementary bundle) and a letter from Alliance Merchant Bank to the first defendant dated 28 April 2003 (pp. 14-17, plaintiff's supplementary bundle). These documents clearly show that the first defendant has applied for a loan facility for the purposes of the project. If the first defendant was not a party/contractor for the project as pleaded by the first defendant why did the first defendant apply for a loan facility for the execution of the project?

(c) A letter from the second defendant to YKMP/KKMP dated 3 September 2003 (p. 18-19, plaintiff's supplementary bundle). This letter shows clearly that the first and second defendant are

the same entity and the second defendant has given an undertaking to absorb all the obligations and rights of the first defendant as stated in the agreement entered into between the first defendant and YKMP/KKMP.

(d) A letter from YKMP/KKMP to the second defendant dated 28 August 2004 (pp. 20-22, plaintiff's supplementary bundle).

(e) A letter from the Ministry of Finance dated 6 November 2004 (pp. 23-24, plaintiff's supplementary bundle); and

(f) A letter from the first defendant to Messrs Idris & Partners dated 21 September 2005 (pp. 25-26, plaintiff's Supplementary Bundle). In this letter the first defendant has clearly admitted to liability for the arbitration award and that it would make payment to the plaintiff. However, they have failed to do so.

(g) All the documents mentioned above show clearly the direct involvement of the first defendant in the project and they constitute proof that the first defendant is the *de facto* contractor for the project.

[87] In cross-examination, PW2 testified as follows:

Qn: Why did the plaintiff not bring in the 1st and 2nd defendants as defendants in the arbitration?

PW2: We thought there was no necessity to do that because the officers who represented YKMP were the officers of the 1st and 2nd defendants.

Put: The plaintiff did not bring the 1st and 2nd defendants into the arbitration as parties because there was no contractual relationship between the plaintiff and the 1st and 2nd defendants.

Ans: No written agreement between the plaintiffs and the 1st and 2nd defendants.

Qn2: 3rd para of answer referred to.

Ans: Name of the GM of YKMP is Abdul Rahim. He told PW2 that YKMP was unaware of the arbitral proceedings against YKMP.

Suit by YKMP in Kuantan High Court was struck out because YKMP did not comply with case management directions and YKMP allowed its suit against the 1st and 2nd defendants for an indemnity to be struck out.

YKMP did not lodge any report.

Indemnity is based on the fact that the 1st and 2nd defendants were the *de facto* contractor for the project and the secret agreement between YKMP and the 1st and 2nd defendants.

[88] In re-examination, PW2 testified as follows:

> The arbitration had already progressed so far before we found out that the 1st and 2nd defendants were the *de facto* contractors. If we were to stop and start again it would be a complete waste of time. The plaintiff could sue the 1st and 2nd defendants.

DW1's Evidence

[89] In his examination-in-chief which is contained in his witness statement (D3), DW1 stated as follows:

(1) S: Boleh Encik Tarin beritahu Mahkamah apakah hubungan Encik Tarin dengan Defendan Pertama dan Kedua.

J: Saya adalah pengarah syarikat Defendan Pertama dan Kedua.

(2) S: Boleh beritahu Mahkamah adakah Encik Tarin mempunyai pengetahuan berhubung Konsortium Kontraktor-Kontraktor Melayu Pahang Berhad?

J: Ya. KKMPB telah melantik Defendan Pertama sebagai Sub Kontraktor bagi projek yang dikenali sebagai 'Cadangan Membina Politeknik Muadzam Shah, Mukim Bebar, Daerah Pekan, Pahang'.

(3) S: Adakah Encik Tarin mempunyai apa-apa pengetahuan berhubung syarikat plaintif?

J: Ya, plaintif adalah arkitek bagi projek tersebut yang dilantik oleh KKMPB.

(4) S: Adakah Encik Tarin tahu mengenai tuntutan plaintif terhadap defendan di dalam tindakan ini?

J: Ya, mereka menuntut agar Defendan Pertama dan Kedua membayar jumlah award timbangtara yang perlu dibayar oleh KKMPB kepada plaintif.

(5) S: Adakah Defendan Pertama dan Kedua mempunyai apa-apa ikatan perjanjian atau kontrak dengan plaintif?

J: Tiada.

(6) S: Adakah Encik Tarin terlibat dalam proses timbangtara antara plaintif dan KKMPB?

J: Ya, saya dipanggil sebagai saksi.

(7) S: Adakah pihak KKMPB pernah mengambil apa-apa tindakan undang-undang terhadap Defendan Pertama berhubung projek tersebut?

J: Ya ada, mereka telah memfailkan tindakan undang-undang di Mahkamah Tinggi Kuantan untuk menuntut Defendan Pertama membayar jumlah award timbangtara tetapi telah tidak meneruskan dengan tindakan itu.

(8) S: Ada pihak KKMPB memperolehi apa-apa Penghakiman atau perintah terhadap Defendan Pertama atau Kedua?

J: Tiada.

(9) S: Adakah Encik Tarin tahu apakah status KKMPB kini?

J: Setahu saya KKMPB telah digulungkan oleh pihak plaintif.

(10) S: Tadi Encik Tarin beritahu Mahkamah ada tindakan Timbangtara antara plaintif dan KKMPB, boleh beritahu apakah yang dituntut oleh plaintif di dalam tindakan Timbangtara tersebut?

J: Plaintif menuntut gantirugi atas penamatan salah oleh pihak KKMPB terhadap plaintif.

(11) S: Boleh Encik Tarin beritahu Mahkamah siapakah yang menamatkan perkhidmatan plaintif di dalam projek tersebut?

J: KKMPB.

(12) S: Sila lihat dokumen mukasurat 30 Ikatan Dokumen Bersama dan beritahu Mahkamah adakah Encik Tarin pernah melihat dokumen ini?

J: Ya pernah.

(13) S: Adakah Encik Tarin tahu kenapakan pihak Defendan Kedua membuat bayaran kepada plaintif?

J: Ya, atas arahan daripada pihak KKMPB.

(14) S: Ada pihak Defendan Pertama membuat apa-apa bayaran kepada pihak plaintif?

J: Tiada.

(15) S: Sila lihat dokumen di mukasurat 44 hingga 61 Ikatan Dokumen Bersama dan beritahu Mahkamah adakah Encik Tarin pernah melihat dokumen ini?

J: Ya.

(16) S: Boleh beritahu Mahkamah apakah dokumen ini?

J: Ini adalah writ saman yang difailkan oleh KKMPB terhadap Defendan Pertama dan Kedua di Mahkamah Tinggi Kuantan.

(17) S: Boleh beritahu Mahkamah apakah keputusan Mahkamah berhubung tindakan saman tersebut?

J: Tiada sebarang keputusan kerana plaintif tidak meneruskan dengan tindakan itu.

(18) S: Sila lihat dokumen di mukasurat 76 hingga 103 Ikatan Dokumen Bersama dan beritahu Mahkamah apakah dokumen-dokumen ini?

J: Ini adalah perjanjian antara Defendan Pertama dan KKMPB yang melantik Defendan Pertama sebagai Sub Kontraktor bagi projek tersebut.

(19) S: Boleh beritahu Mahkamah adakah pihak defendan mempunyai apa-apa hutang atau tanggungan di bawah perjanjian tersebut untuk membayar plaintif jumlah award seperti dituntut di dalam tindakan ini?

J: Tidak ada.

[90] In cross-examination, DW1 testified as follows:

Tak setuju YKMP telah menyerahkan segala hak kepada D1.

Colonel Johar ialah bagi pihak YKMP.

Dia asalnya berkhidmat dengan Kausar. Apabila projek dapat, dia berkhidmat dengan YKMP.

Tak setuju D1 dan D2 terlibat dalam penamatan perkhidmatan plaintif oleh YKMP.

Perunding Kerajaan yang mendesak plaintif ditamatkan sebagai arkitek.

DW1 hadir sebagai pemerhati.

YKMP telah bermesyuarat dengan Kementerian Pelajaran sebelum itu. Menurut Kementerian Pelajaran, walaupun sudah 1 tahun, plaintif masih belum conclude drawing-drawing termasuk working drawing untuk perunding lain membina bangunan. Kerana berdasarkan drawing-drawing tersebut, bill of quantities tak boleh disediakan.

DW1 telah memberi satu undertaking untuk absorb kerugian kerajaan Malaysia sekiranya drawing-drawing plaintif adalah tidak mencukupi untuk pembinaan.

Nilai kontrak adalah berdasarkan undertaking yang diberikan oleh DW1.

Drawing-drawing adalah hanya 90% yang dinyatakan dalam surat plaintif. Sebenarnya, peratus tak siap adalah lebih dari itu.

It was raised often by the Government's Consultant that the drawings for purposes of construction were not completed by the plaintiff.

Para 4.1 (i)(b), pg 87 of Bb referred to.

Bersetuju bahawa Defendan Pertama telah berjanji untuk mempampaskan YKMP untuk kesemua liabiliti YKMP.

Seksyen 8.2.1 (bb), ms 97, BB.

Perjanjian bertarikh 6.7.2000: plaintiff ditamatkan selepas perjanjian ditandatangani.

Cadangan: Arbitral award harus ditanggung rugi oleh 1st defendant berdasarkan akujanji ini.

Jawapan: Tak setuju.

[91] In re-examination, DW1 testified as follows:

> Perjanjian ini ialah untuk pelaksanaan projek dalam kes ini iaitu kerja-kerja di tapak. Perjanjian ini tak pernah diberitahu kepada kerajaan. Maka pada satu ketika Kerajaan hairan tentang penglibatan Kausar dalam projek.

First Defendant's Submissions

[92] Upon the conclusion of the trial, the first defendant submitted that the first defendant cannot be held liable for the judgment sum based on the following grounds:

(1) The plaintiff was appointed by KKMP before KKMP executed the two agreements with the first defendant which contain the assignment clause.

(2) Hence, the contract of appointment of the plaintiff as the original consultant architect for the project binds only KKMP and the plaintiff.

(3) It does not bind the first defendant and it can only be enforced by the plaintiff against KKMP and not against the first defendant.

(4) By virtue of the wording of the assignment clause, the assignment is neither an absolute assignment nor a debt assignment.

[93] Therefore, the court ought to dismiss the plaintiff's claim with costs.

Plaintiff's Submissions

[94] In brief, the plaintiff submitted that the first defendant is liable to the plaintiff on the following grounds:

(1) The first and second defendants are in substance the same entity;

(2) The second defendant had used the first defendant as its front in its dealings with third parties including the plaintiff and both the first and second defendants are a bunch of deceits;

(3) By the assignment clause, KKMP has assigned all its benefits, rights, interests and liabilities in the project to the first defendant;

(4) In consideration of the assignment, the first defendant has agreed to pay to KKMP a sum of RM2,800,000 as a commission and the first defendant has also agreed to indemnify KKMP from all claims made against it by any third party ("the contract of indemnity");

(5) However, the plaintiff is not suing the first defendant based on the assignment clause in the sub-contract-cum-assignment that was entered into between KKMP and the first defendant;

(6) The plaintiff is suing the first defendant based on the contract of indemnity in the sub-contract-cum-assignment between the first defendant and YKMP, later renamed KKMP;

(7) The plaintiff is also suing the first and second defendants because they were the *de facto* employer of the plaintiff since the first and second defendants had conducted the affairs of the project in the name of KKMP;

(8) By virtue of s. 71 of the Contracts Act 1950, the first and second defendants are liable to pay to the plaintiff the cost of the architectural services that they had rendered to YKMP for the project because the first and second defendants had enjoyed the benefits of the plaintiff's services;

(9) The plaintiff had no knowledge of the true nature of the contractual relationship between the first and second defendants on the one part and KKMP on the other part due to the deliberate concealment of facts by the first and second defendants;

(10) The first and second defendants did not disclose their real standing *vis-à-vis* YKMP to all the third parties, who were involved in the project, including the plaintiff. They had, all along, represented to third parties that they had the full mandate from YKMP to conduct the affairs of the project. No details were revealed.

(11) The purpose of the arbitration was to determine the amount of monetary reliefs that the plaintiff as the project's original consultant architect was entitled to claim from the turnkey contractor at the time of the early termination of the plaintiff's services by the turnkey contractor.

(12) The first and second defendants' contention that they were not parties to the arbitral proceedings show a lack of honour, dignity and class on their part;

(13) The first and second defendants had conducted the arbitral proceedings surreptitiously in the name of KKMP because they did not even inform KKMP of the arbitral proceedings that were commenced by the plaintiff against KKMP;

(14) During the arbitral proceedings, Tharin Ayub (DW1), even misrepresented the fact that he was a director of YKMP/KKMP when he was, in fact, not a director of YKMP/KKMP.

(15) KKMP only came to know of the arbitral proceedings upon receipt of the arbitral award together with a demand for payment from the plaintiff's solicitors; and

(16) The court should also impose punitive costs on the first and second defendants as a form of deterrence based on their unsavoury and despicable conduct.

Decision Of The Court

[95] On 15 December 2014, the court agreed with and accepted the submissions of the first defendant that the plaintiff's claim had no merit because the plaintiff had failed to prove its claim against the first defendant on a balance of probability.

[96] Consequently, the court dismissed the plaintiff's claim with costs of RM10,000 to be paid by the plaintiff to the first defendant.

[97] On 12 January 2015, being dissatisfied with the decision of the court, the plaintiff filed a notice of appeal to the Court of Appeal against the decision of the court.

Reasons For The Decision Of The Court

[98] Below are the reasons why the court decided in that manner:

Issues To Be Tried

[99] There are nine issues that have been agreed upon by both parties to be tried and determined by the court.

[100] The nine issues are as follows:

(1) Whether the first and second defendants are the same entity?

(2) Whether the first and second defendants are the main *de facto* contractor for KKMP, previously known as YKMP, for the project?

(3) Whether the first and second defendants are the real parties to the main contract instead of YKMP, who had appointed the plaintiff as the consultant architect for the project, and whether they were the *de facto* employer of the plaintiff at the material time for the project?

(4) Whether the first and second defendants paid a sum of RM125,000 to the plaintiff (in the plaintiff's capacity as the original consultant architect) being part payment for their professional fees for the work done for the project?

(5) Whether the services of the plaintiff as the original consultant architect for the project were actually terminated by the first and second defendants?

(6) Whether the first and second defendants have indemnified YKMP/KKMP for any claim by any third party against YKMP/KKMP in relation to the project and, further, whether the first and second defendants have entered into a written agreement with YKMP/KKMP for that purpose?

(7) Whether the first and second defendants have offered on behalf of YKMP/KKMP to pay a sum of RM1,001,896.08 to the plaintiff being the professional fees of the plaintiff for the work done by the plaintiff?

A (8) Whether the first and second defendants are liable to pay to the plaintiff the arbitration award dated 28 February 2005 which was registered at the High Court of Kuala Lumpur *vide* Judgment No: R1024-19-2005 dated 26 August 2005?

B (9) Whether the first and second defendants have appointed FAU Architect as the new consultant architect for the project to replace the plaintiff?

[101] However, upon the conclusion of the trial, the court agreed with and accepted the submissions of the first and second defendants that there is only one issue that requires the determination of the court. This is because the C court was of the considered view that the determination of that one issue is sufficient to dispose of the plaintiff's suit against the first and second defendants.

[102] That one issue is as follows:

D (1) Whether the first defendant is liable to pay to the plaintiff the amount as specified in the final award by virtue of the assignment clause in the sub-contract-cum-assignment dated 6 July 2000 that was entered into between the first defendant and KKMP?

[103] The court decided the sole issue in the negative.

E **[104]** This is because the court was of the considered view that the first defendant is not liable to pay to the plaintiff the amount as specified in the final award by virtue of the assignment clause in the sub-contract-cum-assignment dated 6 July 2000 that was entered into between the first defendant and KKMP.

F **[105]** The reasons why the court decided in that manner are as follows:

[106] Firstly, it is trite law that a contract cannot confer rights or impose obligations arising under the contract on any person except the parties to the contract itself.

G **[107]** In the instant case there is no contractual nexus between the plaintiff and the first defendant since it is an agreed fact that there was no agreement that was executed between the plaintiff and the first defendant.

[108] The parties have also agreed that the appointment of the plaintiff as the consultant architect for the project was made by YKMP even before YKMP H signed the main contract with the Government and before YKMP signed the sub-contract-cum-assignment with the first defendant on 6 July 2000.

[109] Therefore, since the plaintiff has no privity of contract with the first defendant, the first defendant cannot be held liable for the debt that KKMP owes to the plaintiff.

I

[110] Hence, any undertaking or agreement between the first defendant and KKMP cannot be enforced by the plaintiff in the instant suit against the first defendant.

[111] In other words, there is no privity of contract between the plaintiff and the first defendant because the plaintiff is not a party to the sub-contract-cum-assignment that was executed by the first defendant and KKMP and there is nothing therein that has mentioned the appointment of the plaintiff by KKMP as the consultant architect for the project.

[112] The first defendant is also not a party to the contract between the plaintiff and KKMP.

[113] Therefore, the plaintiff has no locus whatsoever to enforce the main contract between the first defendant and the Government or to enforce the contract between the plaintiff and KKMP for the appointment of the plaintiff as the consultant architect for the project against the first defendant.

[114] In *The Golf Cheque Book Sdn Bhd & Anor v. Nilai Springs Bhd* [2006] 1 CLJ 259; [2006] 1 MLJ 554 at p. 268 (CLJ); p. 559 (MLJ), the Court of Appeal held as follows:

> the doctrine of privity of contract applies where parties to a contract purport to confer a benefit or to impose a burden on a third party. In that fact pattern the third party cannot sue on the contract to recover the benefit. Not may either party to the contract seek to make the third party liable on the obligations imposed upon him or her by them. But it is central to the doctrine of privity of contract that the parties to the contract are contracting on their behalf and not as the agent of some third party, be that the third party a disclosed or an undisclosed principal. Because it is a well-established principle that agency is an exception to the privity doctrine.

[115] In *Suwiri Sdn Bhd v. Government of the State of Sabah* [2008] 1 CLJ 123; [2008] 1 MLJ 743, the Federal Court held as follows at p. 750:

> The doctrine of privity of contract is that as a general rule, a contract cannot confer rights or impose obligations on strangers to it, ie, persons who are not parties to it.

Is The Assignment An Absolute Assignment?

[116] To answer this question the court has to construe the meaning of the wording in s. 2.1 of the sub-contract-cum-assignment and the wording of the other relevant sections therein (see *Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd* [1984] 2 MLJ 268).

[117] The section states as follows:

> In consideration hereinafter mentioned YKMP agrees to grant and transfer to VC Technologies all the benefits, rights and interests as stipulated in the Contract Agreement including the obligations contained herein.

[118] The court notes that by virtue of s. 3.1 of the sub-contract-cum-assignment, the first defendant has agreed to pay to YKMP a sum of RM2,800,000 as the consideration for the above assignment by YKMP in favour of the first defendant.

[119] It is also an agreed fact between the plaintiff and the first defendant that KKMP has surrendered all its rights over the project to the first defendant.

[120] The word "assignment" has been given the following meanings:

> A transfer of property, most commonly of a lease or a chose in action (q.v.) but also a contractual liability or benefit.

(see p. 40 of *Osborn's Concise Law Dictionary*, 11th edn).

> 1. The transfer of rights or property <assignment of stock options>. [Cases: Assignments 31.] 2. The rights or property so transferred <the aunt assigned those funds to her niece, who promptly invested the assignment in mutual funds>.
>
> "An *assignment* is a transfer or setting over of property, or of some right or interest therein, from one person to another; the term denoting not only the act of transfer, but also the instrument by which it is effected. In these senses the word is variously applied in law." Alexander M. Burril, *A Treatise on the Law and Practice of Voluntary Assignments for the Benefit of Creditors* 1, at 1 (James Avery Webb ed., 6th ed. 1894".

(see p. 136 of *Black's Law Dictionary*, 9th edn).

[121] The term "assignment of contract" has been given the following meaning:

> The general rule is that liabilities under a contract cannot be assigned. But they may be assigned with the consent of the other party to the contract to whom the liability is owed and the parties may make them assignable, either expressly or impliedly. The original contracting party normally can procure (hence discharge) the performance of the contract by someone else, but if his personal performance is essential under the contract, e.g. as in a contract to sing in an opera, the liability to perform the contract cannot be assigned.
>
> Rights or benefits under a contract may be assigned by legal assignment, equitable assignment, statute, or by operation of law. See ASSIGNMENT OF CHOSES IN ACTION; NOVATION; PRIVITY OF CONTRACT.

(see p. 40 of *Osborn's Concise Law Dictionary*, 11th edn).

[122] The term "equitable assignment" has been given the following meaning:

> An assignment that, although not legally valid, will be recognized and enforced in equity – for example, an assignment of a chose in action or of future acquisitions of the assignor. %To accomplish an "equitable assignment," there must be an absolute appropriation by the assignor of the debt or fund sought to be assigned.

(see p. 137 of *Black's Law Dictionary*, 9th edn).

[123] In *Public Finance Bhd v. Scotch Leasing Sdn Bhd (In Receivership) (Perwira Habib Bank Malaysia, Intervener)*, *supra*, the Federal Court held as follows in relation to an equitable assignment:

> At common law (in the special sense now of its being distinguished from rules in equity) contractual rights, eg as to debts, were not assignable, ie transferable to another person without the consent of both parties to the contract conferring such contractual rights. Equity stepped in and has long allowed such assignment of such debts to another person who is not privy to the contract in respect of such debts, without at all the consent of the debtor: see eg *Brice v. Bannister* (1878) 3 QB 569; and even without notice to the debtor, see *Kelly v. Selwyn* [1905] 2 Ch 117 and *Ward v. Duncombe* [1893] AC 369. Such assignments as so allowed by equity are called 'equitable assignments'.
>
> The validity of such equitable assignments is not affected by any failure to comply with requirements as laid down in s. 4(3) of the Civil Law Act 1956, for an assignment that so complies has been described as a statutory assignment; being so statutory for such an assignment has the sole intended effect of facilitating an assignee to sue in his own name directly, irrespective of whether the chose in action is an equitable chose in action or a legal chose in action (not, be it noted, whether an assignment is equitable or statutory). By being a statutory assignment itself, the 'statutoriness' of such an assignment, *ipso facto*, does not prevail over an earlier equitable assignment, and this is so even with the added factor that the assignee involved in a statutory assignment took the assignment for value without notice of an earlier equitable assignment: eg see *E Pfeiffer Weikellerei-Weinenkauf GmbH & Co v. Arbuthnot Factors Ltd* [1988] 1 WLR 150.
>
> We need to say a few words more about the great desirability of giving notice of assignment of a debt by an assignee to the debtor, even though absence of such notice does not affect the validity of the equitable assignment as between the assignor and the assignee. If notice is not given, the assignee must give credit for any payment made to the assignor by the debtor. This rule means that, by extension, even if the assignor assigns once more the debt to another person in fraud or otherwise on the earlier assignee, and that other person gives notice to the debtor; and if the debtor pays that other person or the second assignee, then the earlier assignee must still give credit to the debtor for his payment thus, for the debtor cannot be blamed for doing lawfully in ignorance of the title of the earlier assignee who has failed to give notice of the assignment to the debtor. Notice to debtor is for the protection of the assignee himself. It is this effect of what the debtor does lawfully as described that dims the view of the true role of the *nemo dat* rule in the resolution of disputed claims to a same debt. The money paid to the 'second assignee' can, of course, be recovered by the earlier assignee on the *nemo dat* principle.

[124] The term "assignment for value" has been given the following meaning:

> An assignment given in exchange for consideration.

(see p. 137 of *Black's Law Dictionary*, 9th edn).

[125] Based on the facts in the present case, the assignment in favour of the first defendant is an assignment for value because as stated earlier, the first defendant has agreed to pay a sum of RM2.8 million to YKMP in consideration of the assignment.

[126] The term "absolute assignment" has been given the following meaning:

> An assignment that leaves the assignor no interest in the assigned property or right.

(see p. 136 of *Black's Law Dictionary*, 9th edn).

[127] The law on assignment is governed by s. 4(3) of the Civil Law Act 1956 which deals with the effect of an "absolute assignment" in relation to the administration of insolvent estates and the winding up of companies. The section states as follows:

> (3) Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

[128] This section was applied by the Federal Court in *Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd* [1985] 1 CLJ 56; [1985] CLJ (Rep) 231; [1984] 2 MLJ 268, where the Federal Court ruled as follows:

> It is common ground that if the assignment was an absolute one, not purporting to be by way of charge only, within the meaning of section 4(3) of the Civil Law Act 1956, then the appellant, as assignor was not entitled to sue in its own name but the action should be brought by the assignee (Public Bank) in its own name or by the assignee in the name of the assignor (*Read v. Brown* (1889) 22 QBD 128; *Hughes v. Pump House Hotel Co Ltd* [1902] 2 KB 190 and *Walter & Sullivan Ltd v. J Murphy & Sons Ltd* [1955] 2 WLR 919).
>
> …

> It is plain that in every case of this kind, all the terms of the instrument must be considered; and whatever may be the phraseology adopted in some particular part of it, if, on consideration of the whole instrument, it is clear that the intention was to give a charge only, then the action must be in the name of the assignor. While, on the other hand, if it is clear from the instrument as a whole that the intention was to pass all the rights of the assignor in the debt or chose in action to the assignee, then the case will come within section 25 and the action must be brought in the name of the assignee (Mathew LJ in *Hughes v. Pump House Hotel Co. Ltd. (supra)*).

[129] The court is of the considered view that based on the law relating to an absolute assignment and the undisputed facts, the assignment in the instant case is not an absolute assignment because not all the interests of YKMP under the main contract were transferred to the first defendant as the Government was not aware of the assignment and the Government also did not consent in writing to the assignment.

[130] Therefore, the court agreed with and accepted the first defendant's submission that the case of *Artic Building and Civil Engineering Sdn Bhd v. Ahmad Zaki Sdn Bhd & Ors* [2009] 1 LNS 403; [2009] 9 MLJ 328 favours the first defendant and this court ought to apply the decision of the court in that case to the facts in the instant case and, accordingly, rule against the plaintiff.

[131] In that case, the court held that there was no absolute or equitable assignment between the parties.

[132] Similarly in the instant case, the court rules that there was no absolute or equitable assignment of YKMP's rights under the main contract to the first defendant and that the assignment was only for YKMP's obligations to the Government in relation to the development and completion of the project.

Is The Assignment A Debt Assignment?

[133] A debt assignment is the assignment of a debt.

[134] The Federal Court in *The Chartered Bank v. Rashid bin Mohamed* [1985] 1 LNS 133; [1986] 2 MLJ 219 also referred to s. 4(3) of the Civil Law Act 1956 in relation to an issue concerning a debt assignment. In doing so, the Federal Court held as follows:

> … if certain conditions are complied with, any debt or other legal thing in action may be assigned so as to vest in the assignee the legal right to the same and all the remedies therefor, with power to give a good discharge without the concurrence of the assignor.
>
> The conditions which, according to paragraph 12 in volume 6 of *Halsbury's Laws of England* 4th Edition), must be complied with are (1) the assignment must be in writing under the hand of the assignor; (2) the assignment must be absolute, and not purporting to be by way of charge only; and

(3) express notice in writing of the assigmnent must be given to the debtor or other person from whom the assignor would have been entitled to claim the debt or thing an action.

[135] In *Public Finance Bhd v. Scotch Leasing Sdn Bhd; Perwira Habib Bank Malaysia (Intervener)* [1996] 3 CLJ 635; [1996] 2 MLJ 369, the Federal Court held as follows in relation to a debt assignment:

> The true nature of an assignment of a debt or book debt is such that such a debt (not being modified by any statute as regards the applicability of the *nemo dat* rule) can only be transferred by way of assignment, and not, eg by delivery in the case of sale of goods, or in the case of land by executing a valid and registrable transfer according to the provisions of the National Land Code 1965. Assignment is the instrumentality of transfer or sale of a debt.

[136] The court took into consideration the evidence of the first defendant's witness (DW1). DW1 had given evidence that the agreement pertains to the obligations of KKMP to the Government and that it does not include KKMP's debt to the plaintiff in relation to the appointment of the plaintiff as the consultant architect for the project and.

[137] The court was of the considered view that the fact that it was KKMP who terminated the plaintiff's services after the execution of the agreement and the fact that later it was KKMP who appointed a new architect to replace the plaintiff as the consultant architect for the project, it is crystal clear that KKMP did not assign its right *vis-à-vis* the plaintiff to the first defendant and also its liabilities *vis-à-vis* the plaintiff to the first defendant.

[138] Therefore, the court was of the considered view that the assignment could not be construed as an assignment of debt.

[139] Having considered the law relating to a debt assignment and the undisputed facts that the assignment was executed by YKMP and the first defendant before the date of the appointment of the plaintiff by YKMP as the original consultant architect the project, the court held that the assignment is not a debt assignment.

[140] Therefore, the court agreed with and accepted the submissions of the first defendant that since the assignment is neither an absolute assignment nor a debt assignment, the first defendant is not liable to pay to the plaintiffs the judgment sum.

[141] It is trite law that separate legal entities have separate rights and liabilities.

[142] It is also undisputed that the first defendant was not a party to the arbitral proceedings. The first defendant was also not present at the arbitral proceedings and the first defendant did not participate in the arbitral proceedings.

[143] Hence, the court agreed with and accepted the submissions of the first defendant that to allow the plaintiff to enforce the final award against the first defendant would be unjust as it amounts to an abuse of the process of the court.

[144] Therefore, the court held that the first defendant cannot be declared by this court to be liable to pay to the plaintiff the amount of the final award handed down by the arbitrator.

[145] This is because to do so would constitute a clear breach of the rules of natural justice that require a party to be informed of the claim against the party and to be given the opportunity to defend itself against the claim.

[146] Since the plaintiff has, at the outset, elected to challenge the validity of its termination against KKMP alone instead of against KKMP and the first defendant by making them both jointly and severally to the plaintiff for the plaintiff's professional fees and charges on the ground that the first defendant is the *de facto* contractor to the project, it is too late now for the plaintiff to attempt to pin liability on the first defendant in the instant suit after it had failed to obtain satisfaction of the final award and the reimbursement of the costs of the arbitral proceeding from KKMP.

[147] The court noted that the plaintiff's two witnesses (PW1 and PW2) in their evidence agreed that they knew of the existence of the first defendant in the project even before the arbitral proceedings were commenced by the plaintiff against KKMP. Yet the plaintiff had elected to challenge the validity of its termination by KKMP by way of the arbitral proceedings solely against KKMP instead of against KKMP and the first and second defendants.

[148] The facts and the nature of the plaintiff's claims in *Tenaga Nasional Bhd v. Irham Niaga Sdn Bhd & Anor* [2011] 1 CLJ 491; [2011] 1 MLJ 752 are similar to the facts and the nature of the plaintiff's claim against the first defendant in the instant case. In that case, the court dismissed the plaintiff's suit against the defendant because the plaintiff did not include the defendant in the arbitral proceedings.

[149] Be that as it may, the court is of the considered view that the nine issues that have been framed by the parties ought to be decided as follows:

Issue (1): Whether The First And Second Defendants Are The Same Entity?

[150] The court is of the considered view that there is insufficient evidence to establish that the first and second defendants are the same entity. On this issue, the court also took into consideration the evidence of PW1 that the first and second defendants are not the same entity merely because they share common directors and shareholders.

A *Issue (2): Whether The First And Second Defendants Are The Main De Facto Contractor For KKMP, Previously Known As YKMP, For The Project?*

[151] The court is of the considered view that there is insufficient evidence to establish that the first and second defendants are the main *de facto* contractor for KKMP, previously known as YKMP, for the project. The court noted that the plaintiff opted not to call any witness from KKMP to testify on this issue and the plaintiff's assertion on this issue remains a bare self-serving assertion.

Issue (3): Whether The First And Second Defendants Are The Real Parties To The Main Contract Instead Of YKMP, Who Had Appointed The Plaintiff As The Consultant Architect For The Project, And Whether At The Material Time They Were The De Facto Employer Of The Plaintiff, For The Project?

[152] The court is of the considered view that there is insufficient evidence to establish that the first and second defendants are the real parties to the main contract instead of YKMP, who had appointed the plaintiff as the consultant architect for the project, and that they were the *de facto* employer of the plaintiff at the material time for the project. The court noted that the plaintiff has opted not to call any witness from KKMP and/or the third defendant and/or the Government to testify on this issue.

Issue (4): Whether The First And Second Defendants Paid A Sum Of RM125,000 To The Plaintiff (In The Plaintiff's Capacity As The Original Consultant Architect) Being Part Payment For Their Professional Fees For The Work Done For The Project?

[153] The court is of the considered view that the first and second defendants paid a sum of RM125,000 to the plaintiff (in the plaintiff's capacity as the original consultant architect) being part payment for their professional fees for the work done for the project as this fact is not disputed by the first defendant.

Issue (5): Whether The Services Of The Plaintiff As The Original Consultant Architect For The Project Were Actually Terminated By The First And Second Defendants?

[154] The court is of the considered view that there is insufficient evidence to establish that the services of the plaintiff as the original consultant architect for the project were actually terminated by the first and second defendants. On the contrary, based on the reasons given earlier herein the court found that the services of the plaintiff were terminated by YKMP.

Issue (6): Whether The First And Second Defendants Have Indemnified YKMP/KKMP For Any Claim By Any Third Party Against YKMP/KKMP In Relation To The Project And, Further, Whether The First And Second Defendants Have Entered Into A Written Agreement With YKMP/KKMP For That Purpose?

[155] The court is of the considered view that there is insufficient evidence to establish that the first defendant has indemnified YKMP/KKMP for any claim by any third party against YKMP/KKMP in relation to the project although by virtue of the two sections mentioned above in the sub-contract-cum-assignment, the first defendant has entered into a written agreement with YKMP/KKMP for that purpose.

[156] This is because the court notes that by virtue of s. 4.1 (i) (b) of the sub-contract-cum-assignment as reproduced earlier herein (see also p. 87 of bundle B), the first defendant has covenanted and undertaken to do the following:

> provide all development costs of the Project and **shall undertake all liabilities and absolver (*sic*) YKMP from the same that may arisen (*sic*) from any parties (*sic*) in the implementation and completion of** the Project. (emphasis added).

[157] Section 8.2(a)(bb) of the sub-contract-cum-assignment also states as follows:

> V.C. Technologies shall be responsible and *(sic)* indemnify YKMP for any action taken by any parties arisen *(sic)* from the default;

(see p. 97 of the common bundle of documents)

[158] However, the court is of the considered view that since the contract of indemnity is between YKMP and the first defendant only and there is, therefore, no privity of contract between the plaintiff and the first defendant the plaintiff cannot sue the first defendant in order to enforce the indemnity against the first defendant.

[159] The law relating to indemnities is as follows:

> **Indemnities.** The term "indemnity" is used in the law in several different senses. In its widest sense it means recompense for any loss or liability which one person has incurred, whether the duty to indemnify comes from an agreement or not. For example, where a breach of contract gives rise to a claim for damages, that claim may include a claim to be indemnified against some loss or liability. So also, on rescission of a contract for misrepresentation, the representee may be entitled to an indemnity against liabilities incurred under the contract even where there is no claim to damages. In cases of this nature the claim to an indemnity arises by operation of law, not out of a contract of indemnity. A person who breaks a contract or makes a misrepresentation is not agreeing to indemnify the other party against the loss he may suffer. Indemnities of this nature fall outside the scope of this chapter. But an obligation to

A indemnify another may also arise out of a contract of indemnity, and the term "contract of indemnity" is also used in more than one sense. In its widest sense a contract of indemnity includes all contracts of guarantee and many contracts of insurance; in its narrow sense, a contract of indemnity is used in contrast to a contract of guarantee, and it is in this narrow sense that the term is generally used in this chapter.

B

Guarantees and indemnities: the significance of the distinction. The distinction between a contract of indemnity and a contract of guarantee was originally evolved by the courts in the process of construing s. 4 of the Statute of Frauds 1677 which required writing for certain classes of contracts including contracts of guarantee, and it is therefore dealt with C in detail in the consideration of that section. But the distinction has also come to have a more general importance throughout the law of suretyship and it is therefore necessary to explain it briefly here. Thus, apart from the fact that contracts of guarantee but not of indemnity must be evidenced by a note or memorandum in writing under the Statute of Frauds, the distinction is of importance in at least three other situations. D First, the question whether a surety is liable where the main contract is void because of the principal debtor's incapacity, has been said to depend on the distinction between guarantees and indemnities, and that same may also be true of other invalidating causes. Secondly, the liability of a guarantor is normally co-extensive with the liability of the principal debtor, so that if the debtor is discharged the surety will also be discharged, E whereas if the contract is one of indemnity, the surety is not necessarily discharged. Thirdly, certain other rules of law apply to guarantees (where only a secondary liability is undertaken) but not indemnities (where a primary liability is undertaken), for example, the rule that any material variation of the contract between the debtor and the creditor will in principle discharge a guarantor but not a person undertaking a primary F liability.

Guarantee and indemnities: the distinction itself. The distinction between the two contracts is, in brief, that in a contract of guarantee the surety assumes a secondary liability to answer for the debtor who remains primarily liable; whereas in a contract of indemnity the surety assumes a G primary liability, either alone or jointly with the principal debtor. Whether a contract falls into one class or the other, and whether the normal incidents of a contract of that class are modified, are ordinary questions of construction. In this respect, while the presence or absence of the language of "guarantee" in the document is not conclusive, outside the context of documents issued by banks, the absence of language H appropriate to provide for the creditor "the additional security of a demand bond" creates a strong presumption in favour of a merely secondary liability. Moreover:

> with the parties free to agree whatever terms they choose, there is in this field of law a spectrum of contractual possibilities ranging I from the classic contract of guarantee, properly so called, at the one end, where liability of the guarantor is exclusively secondary and will be discharged if, for example, there is any material

> variation to the underlying contract between principal and creditor, to the performance or demand bond (or demand guarantee) at the other end, where liability in the giver of the bond may be triggered by mere demand and without proof of default by the principal (and indeed where it may be apparent that the principal is not in default).
>
> However, as has been explained, the nature of the relationship between the creditor and the surety may differ from the nature of the relationship between the debtor and the surety. It is therefore possible that even where the relationship between the surety and the creditor is that of a contract of indemnity, the debtor may still be primarily liable as between himself and the surety. Thus although a contract of indemnity cannot itself be a contract of suretyship, the party liable under such a contract may be a surety as against the debtor and it is common and convenient to speak of him as such, even though he has assumed a primary liability towards the creditor. On the other hand, it is of course perfectly possible to have a contract of indemnity in which there is no suretyship at all, because, for example, the party liable under the indemnity has not contracted at the request of another debtor. Thus a dealer who agrees by a "recourse agreement" to indemnify a finance company against any loss under a hire-purchase transaction is not a surety either against the creditor or against the debtor. And even where, as between two debtors, one is primarily liable and the other only secondarily liable, there is not necessarily a contract of suretyship. For instance, where a tenant assigns his interest under a lease and the assignee covenants to indemnify the assignor against liability for breach of covenants in the lease, the assignee is, as between himself and the assignor, primarily liable, but there is no contract of suretyship between them. And similarly, where property is sold subject to a mortgage, the mortgagor is not surety for the purchaser.

(see pp. 1691-1694, *Chitty on Contracts*, vol. 2, 31st edn).

Issue (7): Whether The First And Second Defendants Have Offered On Behalf Of YKMP/KKMP To Pay A Sum Of RM1,001,896.08 To The Plaintiff Being The Professional Fees Of The Plaintiff For The Work Done By The Plaintiff?

[160] The court is of the considered view that based on the evidence adduced by the parties the first and second defendants have offered on behalf of YKMP/KKMP to pay a sum of RM1,001,896.08 to the plaintiff being the professional fees of the plaintiff for the work done by the plaintiff. However, the offer was rejected by the plaintiff and the dispute was then referred to arbitration and the final award was in favour of the plaintiff.

Issue (8): Whether The First And Second Defendants Are Liable To Pay To The Plaintiff The Arbitration Award Dated 28 February 2005 Which Was Registered At The High Court Of Kuala Lumpur Vide Judgment No.: R1024-19-2005 Dated 26 August 2005?

[161] Since the plaintiff has withdrawn its claim against the second defendant and the claim against the second defendant has been duly struck out, the court is of the considered view that based on the reasons given earlier

herein the first defendant is not liable to pay to the plaintiff the arbitration award dated 28 February 2005 which was registered at the High Court of Kuala Lumpur *vide* Judgment No: R1024-19-2005 dated 26 August 2005.

Issue (9): Whether The First And Second Defendants Have Appointed FAU Architect As The New Consultant Architect For The Project To Replace The Plaintiff?

[162] The court is of the considered view that there is insufficient evidence to establish that the first and second defendants have appointed FAU architect as the new consultant architect for the project to replace the plaintiff.

Conclusion

[163] Based on the reasons as set out above, the court was satisfied that the plaintiff has failed to prove its claim against the first defendant on a balance of probability.

[164] Hence, the court ordered the dismissal of the plaintiff's claim against the first defendant with costs of RM10,000.